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In the

Supreme Court of the United States

October Term, 1997

W.P., *et al.*, Individually and as Representatives of a Class Pursuant to Fed.R.Civ.P. 23(a) and 23(b)(2),

Petitioner,

v.

PETER VERNIERO, Attorney General of New Jersey, *et al.*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court's decision in *Hudson v. United States*, __ U.S. __, 1997 WL 756641 (U.S. 1997), provides sufficient guidance with respect to the test to determine whether a civil measure imposes punishment for purposes of the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution.

2. Whether the court of appeals correctly affirmed the district court's decision that the community notification provisions of New Jersey's "Megan's Law" do not impose punishment and, therefore, do not violate the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution.

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STATEMENT OF THE CASE

Respondent, the Attorney General of New Jersey, opposes the petition for a writ of *certiorari* seeking further review of a decision of the United States Court of Appeals for the Third Circuit in *E.B. v. Verniero*, 119 F.3d. 1077, 1087 (3d Cir. 1997),[1] which upheld the constitutionality of the sex offender community notification requirements of New Jersey's "Megan's Law."[2] In *E.B.*, the court of appeals held, in a 2-1 decision, that the community notification provisions of Megan's Law do not violate the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution. Petitioners, a class of convicted sex offenders required to register and subject to notification pursuant to Megan's Law who committed predicate sex offenses prior to the effective date of the law, urge this Court's exercise of jurisdiction but offer no reasons of sufficient moment to justify further review of the conclusion reached below. Further review of the ex post facto and double jeopardy holdings of the *E.B.* decision is unnecessary, apart from any benefit that would result from affirming the judgment below, thereby establishing as a matter of nationwide precedent the correctness of the Third Circuit's holding.

Respondent relies upon the extensive review of the background, details and operation of the Megan's Law community notification scheme set forth in the *E.B.* opinion (*id.* at 1081-90; App. B at 6a-29a), supplemented as follows. The New Jersey Legislature enacted Megan's Law to address

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[1] The decision of the court of appeals is reprinted in Appendix B to the petition for *certiorari*. All subsequent references to this case will include citations to both the reported case and petitioners' appendix.

[2] Petitioners were partially successful on their challenge based upon the Due Process Clause and do not seek further review of that claim. Respondent is filing a conditional cross-petition seeking review of the due process holding in the event the Court grants this petition.

the "danger of recidivism posed by sex offenders and others who have committed predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness." N.J. Stat. Ann. § 2C:7-1(a). Megan's Law established a system of registration of sex offenders and offenders who commit other predatory acts against children, N.J. Stat. Ann. § 2C:7-1(b), and a notification program in which the scope of notice is calibrated to the comparative risk of reoffense posed by the individual registered offender. *E.B.*, *supra*, 119 F.3d at 1083; App. B at 10a. Under the three-tiered notification program, where the risk of reoffense is comparatively low (Tier 1 notification), dissemination of notice is limited to law enforcement authorities; where the risk of reoffense is moderate (Tier 2 notification), institutions and organizations having the responsibility to care for and supervise children and women and which are likely to encounter the offender also receive notice; and where the risk of reoffense is high (Tier 3 notification), those members of the public likely to encounter the offender are also notified. *Ibid.*

The court of appeals reviewed the statutory scheme, and affirmed the district court's decision holding that the notification provided under Megan's Law does not constitute punishment under the Ex Post Facto and Double Jeopardy Clauses. *See W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996), *aff'd in part, rev'd in part sub nom.*, *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); App. H, 133a-186a. In reaching this conclusion, the court of appeals utilized the three-prong test for punishment devised in *Artway v. Attorney General*, 81 F.3d 1235 (3d Cir. 1996), the application of which is informed by this Court's decision in *Hendricks v. Kansas*, __ U.S. __, 117 S.Ct. 2072 (1997). The resultant test led the court to consider whether the stated legislative purpose underlying the law was remedial and to examine whether the objective purpose or the effects of the law are sufficiently punitive to overcome a presumption

favoring the legislative judgment. *E.B.*, *supra*, 119 F.3d at 1096; App. B. at 44a.

The court of appeals, which had already found a remedial legislative purpose underlying the registration law, *see Artway*, *supra*, 81 F.3d at 1264, reached a similar conclusion with respect to the Legislature's declared purpose in enacting the community notification law, "which is remedial and devoid of any indication of an intent to punish." *E.B.*, *supra*, 119 F.3d at 1097; App. B at 45a-47a.

In evaluating whether the "objective purpose" of community notification is to punish, the court of appeals determined that "Tier 2 and 3 dissemination of information beyond law enforcement personnel is reasonably related to the nonpunitive goals of Megan's Law." *Id.* at 1098; App. B at 48a. The court of appeals further found that the remedial goals of community notification "have not been pursued in a way that has imposed a burden on registrants that clearly exceeds the burden inherent in accomplishment of the goals" and held that the statutory scheme is a permissible "measured response" to the identified problem. *Ibid.*; App. B at 49a.

The court rejected the tendered historical analogy of community notification to colonial punishments such as public shaming and banishment, noting that "[d]issemination of information about criminal activity ... has never been regarded as punishment when done in furtherance of a legitimate governmental interest." *Id.* at 1099; App. B at 53a. The court concluded that, "[b]ecause the closest analogies have not historically been regarded as punishment ... historical precedent does not demonstrate an objective punitive purpose." *Id.* at 1101; App. B at 56a.

The court also rejected the contention that the effects of community notification are so severe that the measure imposes unconstitutional punishment even though no actual

or objective punitive purpose is shown. *Id.* at 1101-04; App. B at 56a-65a. The court recognized that, while notification may extend the duration of society's response to an offender who commits a reprehensible crime and is publicly prosecuted, the effect is not "sufficiently burdensome to require classification of the law as punitive." *Id.* at 1104; App. B at 65a. Accordingly, the court held that "the notification required by Megan's Law does not constitute punishment for purposes of the Ex Post Facto and Double Jeopardy Clauses." *Id.* at 1105; App. B at 65a.

The Third Circuit's decision is entirely consistent with that of the Supreme Court of New Jersey in *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995) on identical punishment issues in a state court challenge to the same community notification law. In addition, the *E.B.* decision coincides with the rulings of the United States Court of Appeals for the Second Circuit, *Roe v. Office of Adult Probation*, 125 F.3d 47 (2d Cir. 1997) and *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), and the United States Court of Appeals for the Ninth Circuit, *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997). Indeed, no federal circuit court has issued a contrary ruling on the question of whether sex offender community notification constitutes punishment in violation of the Ex Post Facto and Double Jeopardy Clauses.

REASONS FOR DENYING THE WRIT

I. This Court's Decision in *Hudson v. United States* Renders Unnecessary Review of this Case for Purposes of Clarifying the Proper Test for Determining Whether a Civil Measure Constitutes Punishment for Purposes of the Ex Post Facto and Double Jeopardy Clauses.

Petitioners invite the Court to use this case as a vehicle to resolve the doctrinal "inconsistency" between this Court's decision in *United States v. Halper*, 490 U.S. 435 (1989), and its subsequent rulings in *United States v. Ursery*, __ U.S. __, 116 S.Ct. 2135 (1997), and *Kansas v. Hendricks*, *supra*. The decision in *Hudson v. United States*, handed down during the pendency of this petition, renders petitioners' invitation superfluous.

Hudson lays to rest any doubts over the applicable analysis for determining whether a civil measure constitutes punishment, expressly disavowing the method of analysis used in *United States v. Halper*, *supra*, and reaffirming the previously established rule illustrated in *United States v. Ward*, 448 U.S. 242 (1980). *Hudson*, *supra*, 1997 WL 756641 at *2-*6. The *Hudson* decision forecloses further proliferation of the type of "novel double jeopardy claims spawned in the wake of *Halper*" (explicitly citing the petitioners' challenge in *E.B.* as an exemplar). *Hudson*, *supra*, 1997 WL 756641 at *4, n.4. *Hudson* also expressly delineates the degree of deference to be accorded to legislative intent, and reaffirms the application of the *Mendoza-Martinez* factors. *Id.* at *4-*5, *citing Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). There appears to be no necessity for further explication on this jurisprudential issue, either with respect to its direct implications for the *E.B.* decision and other challenges to sex offender community notification laws or in the broader context of ex post facto and double jeopardy jurisprudence.

II. There is Uniformity between the *E.B.* Decision and the Decisions of Other Tribunals.

Petitioners candidly acknowledge the decisional uniformity among the United States Courts of Appeals for Second, Third and Ninth Circuits in holding that the respective community notification laws of New York and Connecticut, New Jersey, and Washington state, do not impose punishment for ex post facto and double jeopardy purposes. However, petitioners posit a split in authority based upon the decision of the Supreme Court of Kansas in *State v. Myers*, 923 P.2d 1024 (Kan. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 2508 (1997).

Contrary to petitioners' suggestion, the *Myers* case, which was decided prior to this Court's decision in *Hendricks*, is easily reconciled with the *E.B.* decision. *Myers* does not stand for the proposition that community notification laws such as New Jersey's Megan's Law are punishment. In *Myers*, Kansas' highest court found the registration requirements of the Kansas Sex Offender Registration Act ("KSORA") to be remedial and therefore constitutional, but struck down on ex post facto grounds the public disclosure provision of the law, which the court deemed excessive "beyond the degree necessary to promote public safety." *Id.* at 1043. The *Myers* court reasoned that "KSORA places no restrictions on who is given access to the registered offender information or what that person does with the information." *Id.* at 1041. The court found a law which featured "unlimited public accessibility to the registered information and the lack of any initial individualized determination of the appropriateness and scope of disclosure" to be excessive and therefore punitive. *Id.* at 1044.

The *Myers* decision cannot be read as a blanket condemnation of sex offender community notification laws; in fact, review of the opinion supports the opposite conclusion. The *Myers* decision specifically contrasts the

unlimited public access of the KSORA disclosure provision with the "carefully tailored community notification" of New Jersey's community notification law. *Id.* at 1036. The Kansas Supreme Court opined that the Kansas law would avoid an ex post facto characterization if public access were "limited to those with a need to know the information for public safety purposes." *Id.* at 1043. New Jersey's approach limits the public disclosure of information, if authorized under the law, to persons and relevant organizations deemed "likely to encounter" a registrant with the scope of such notification calibrated to the relative risk of re-offense posed by the registrant based on an individualized risk assessment which is subject to judicial review. The Kansas court's express endorsement of the type of approach undertaken by New Jersey does not signal the existence of an irreconcilable split in authority which merits the attention of this Court.

III. The Court of Appeals Correctly Held that Community Notification under Megan's Law Does Not Impose Punishment.

The court of appeals fully considered and correctly decided the issues upon which petitioners seek further review. As such, review by this Court is not required in order to correct a legally deficient or erroneous decision below.

In conducting its punishment analysis, the majority followed the approach suggested by *Hendricks* and confirmed in *Hudson*, according substantial deference to the manifest remedial intent of the Legislature. There is no dispute over the court's finding that the Legislature's "declared purpose ... is remedial and devoid of an intent to punish." *Id.* at 1097; *see also id.* at 1113-14 (Becker, J., dissenting); App. B at 47a; 85a. Despite petitioners' suggestion that Megan's Law is the product of "unusual procedures" and therefore indicative of a punitive intent, the court of appeals found the context in which Megan's Law was enacted to be "entirely

consistent with its declared remedial purpose." *Id.* at 1096, App. B at 47a.

Prior to the Megan Kanka tragedy, the New Jersey Legislature had already undertaken consideration in that legislative session of the problems posed by sex offenders. The registration and community notification bills were included as part of a package of nine related bills which addressed a range of issues related to sex offenders and other types of offenders, including sentencing, community supervision, civil commitment, victims' rights and use of DNA databanks. *See* N.J. Pub. L. 1994, Chs. 127-136. The Senate Law and Public Safety Committee had previously held a hearing on victim notification, and had heard testimony and received written reports on issues related to sex offender registration and community notification. *E.B.*, *supra*, 119 F.3d at 1081, App. B, 7a-8a.

In its consideration of the Senate counterparts to the Assembly versions of the registration and community notification bills (which ultimately were enacted as part of the "Megan's Law" package), the Senate committee substantially revised the bills. *Ibid*; App. B at 8a. The amended versions of the bills passed the Senate on October 3, 1994. *Ibid.* The General Assembly debated and approved the revised bills on October 20, 1994, and the Governor signed the legislation into law on October 31, 1994. *Ibid.* These additional facts forcefully contradict the notion that the manner is which the law was enacted is indicative of a punitive legislative intent and confirm that the community notification law was the product of the proper operation of the legislative process, which was motivated by the desire to expeditiously address a significant public safety issue.

Upon finding the Legislature's manifest purpose to be "remedial and devoid of any indication of an intent to punish," the court declared it would "reject the legislature's

manifest intent only where a party challenging the statute provides the 'clearest proof' that 'the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id.* at 1096, *citing Hendricks*, *supra*, 117 S.Ct. at 2082 (internal citations omitted); App. B at 43a. The court found that neither the proffered "Scarlet Letter" analogy nor the severity of the asserted effects of community notification, nor any of the other contentions petitioners raised, satisfied this requisite burden.

In rejecting petitioners' attempt to demonstrate a punitive intent by likening the carefully-tailored dissemination of largely-public information provided under Megan's Law to colonial era punishments such as public shaming, humiliation and banishment, the court noted that, in *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981), it had rejected a similar analogy attempting to compare public dissemination of criminal trial information to such shaming punishments. *E.B.*, 119 F.3d at 1099-1101; App. B at 51a-52a. The court identified numerous fundamental differences between the measures, finding closer, more apt historical analogues in the various forms of warnings traditionally provided by the government to protect public safety, such as "armed and dangerous" warning posters and quarantine notices. *Id.* at 1100-01; App. B at 54a-55a.

The Second and Ninth Circuit Courts of Appeal have reached similar conclusions with respect to comparable historical arguments raised in constitutional challenges to sex offender community notification laws enacted in their respective jurisdictions. As Judge Newman opined, "[m]odern day community notification measures serve vastly different purposes than those served by these historical punishments, operate without the physical participation of the offender, and lack the general social significance accompanying traditional shaming and banishment penalties." *Roe v. Office of Adult Probation*, *supra*, 125 F.3d at 55 (upholding Connecticut notification policy); *see also Doe v.*

Pataki, *supra*, 120 F.3d at 1284 (rejecting historical analogy based on fundamental differences between community notification provisions of New York's sex offender registration act and colonial shaming penalties or banishment). The Ninth Circuit also found the colonial punishment analogy too tenuous to furnish the "clear proof" needed to overcome the non-punitive intent underlying the Washington State notification law, and stated that comparisons to "wanted" posters and warnings about escaped prisoners or other dangerous-person practices are "at least as appropriate" as the analogy to colonial shaming punishments. *Russell*, *supra*, 124 F.3d at 1091.

The Third Circuit also examined New Jersey's law for a contradictory punitive purpose evidenced in the design or effect of the law. The court found the registration and carefully tailored notification scheme to be "a measured response to the identified problem" of "possible re-abuse" by recidivist sex offenders, finding "a reasonable 'fit' between end and means." *E.B.*, *supra*, 119 F.3d at 1098; App. B at 48a, 49a. In so concluding, the court considered the salient features of the notification scheme, such as individualized risk assessment based on objective criteria which utilizes a standardized, uniform scale, limited public dissemination tailored to level of relative risk of re-offense (with 50% of those registrants evaluated classified as presenting a moderate risk of reoffense and only 5% of registrants determined to pose a high risk of reoffense, *id.* at 1098, meaning that notification to neighbors would not take place for 95% of the registrants evaluated, with no community notification taking place for nearly half of all registrants), and available judicial review of the proposed tier classification and notification plan.

Many other features of the notification scheme contradict any inference of a hidden punitive intent, such as the available override factors that may limit or even dispense with notification under appropriate circumstances, including,

for example, where an offender "demonstrates a physical condition that minimizes the risk of re-offense[.]" *E.B.*, *supra*, 119 F.3d at 1084, *citing Artway*, *supra*, 81 F.3d at 1244; *see also* N.J. Stat. Ann. § 2C:7-8(b)(2) (identifying as a factor relevant to the risk of re-offense "[p]hysical conditions that minimize risk of re-offense, including but not limited to advanced age or debilitating illness"). The Attorney General's Guidelines (promulgated as required by the community notification law, N.J. Stat. Ann. § 2C:7-8) also provide for discretionary notification "tailored to reach those members of the public who are at risk from the particular offender." *E.B.*, *supra*, 119 F.3d at 1085; App. B at 17a. By way of illustration, the court of appeals cited the example of an offender whose past victims are all members of the immediate family or the household, who the prosecutor may determine is not a risk requiring notice to community organizations or schools that would ordinarily receive notice for a Tier 2 offender, and would limit notification accordingly. *Ibid.*; App. B at 17a-18a. The availability of these options to customize notification further rebuts any assertion of an underlying punitive intent contrary to the Legislature's stated remedial purpose.

The court also correctly rejected the argument that the effects of community notification under Megan's Law are so onerous as to render the measure "punishment." It should also be noted that the Second and Ninth Circuit Courts reached the same conclusion with respect to the effects of the community notification laws enacted by the legislatures in those jurisdictions. *See Doe v. Pataki*, *supra*, 120 F.3d at 1280-81; *Russell v. Gregoire*, *supra*, 124 F.3d at 1092.

The *E.B.* court examined indirect effects related to community notification which would stem from possible reactions of individual citizens to the presence of a convicted sex offender in their community, which effects the court characterizes as injury to "reputational interests," including "isolation, harassment, loss of opportunities," and "exposure

to an increased risk of private violence." *E.B.*, *supra*, 119 F.3d at 1102; App. B at 59a.

The court weighed these effects in its analysis, but consideration of the Court's decisions in *Paul v. Davis*, 424 U.S. 969 (1976), and *Hendricks* led the court of appeals to conclude that such indirect effects do not render community notification under Megan's Law punishment. *E.B.*, *supra*, 119 F.3d at 1102-05; App. B at 59a-63a. The court relied upon *Hendricks* and its antecedents for the proposition that "bona fide remedial legislation may inflict very substantial individual hardship without implicating the Ex Post Facto and Double Jeopardy Clauses." *Id.* at 1103; App. B at 62a. Even the dissent was forced to concede the difficulty in prevailing on this effects argument in light of the *Hendricks* precedent. *Id.* at 1126 (Becker, J., dissenting), App. B at 114a-115a.

Hendricks upheld a program of civil commitment that could potentially result in confinement for life. The Court held that such confinement designed to protect the public serves "a legitimate non-punitive governmental objective and has been historically so regarded." *Hendricks*, *supra*, 117 S.Ct. at 2083, *citing United States v. Salerno*, 481 U.S. 739, 746 (1987). The court of appeals found the state interest in community notification to protect the public to be "similar to, and as compelling as, the state interest served by the civil commitment statute in *Hendricks*." *E.B.*, *supra*, 119 F.3d at 1104; App. B at 63a.

Moreover, in contrast to the civil commitment law, Megan's Law merely provides for dissemination of largely public information. It imposes no affirmative restraints. If civil confinement of repetitive sex offenders is not so punitive as to necessarily require classification as "punishment," then there is no legitimate basis for finding the necessary punitive intent or effect in a law that merely provides information in accordance with risk of reoffense to

persons in a position to take precautions. As the court of appeals concluded, "in terms of the impact on the everyday lives of registrants, the burden of this aspect of Megan's Law pales by comparison to the civil commitment of sex offenders sanctioned in *Hendricks*." *E.B.*, *supra*, 119 F.3d at 1105; App. B at 65a.

The court of appeals also considered the "background risk of private violence," and found that the State takes affirmative steps to discourage such acts. The court, like the Second and Ninth Circuit courts, determined that "the risk of private violence stems primarily from a registrant's past criminal activity." *Ibid.*; App. B at 64a. *See also Doe v. Pataki*, 120 F.3d at 1280-81; *Russell v. Gregoire*, 124 F.3d at 1092. The *E.B.* court found that, at most, dissemination of accurate criminal history and risk information by the State "may materially extend the period during which the increased risk of private violence may exist[.]" *E.B.*, *supra*, 119 F.3d at 1105; App. B at 63a-64a. But based on data from 135 notifications completed in New Jersey as well as information from Washington and Oregon, *id.* at 1088-90, the court found that such occurrences are "relatively rare." *Id.* at 1105; App. B at 64a. Accordingly, the court rejected the contention that this indirect effect is sufficiently burdensome to require classification of the law as punitive. *Ibid.*; App. B at 65a.

Based on the foregoing analysis, the court of appeals concluded that neither the "objective purpose" nor the effects of community notification under Megan's Law compel a conclusion that the law is punitive. This conclusion is neither erroneous nor ill-founded. Indeed, the analysis is in accord with the Court's double jeopardy and ex post facto jurisprudence. The court of appeals' thorough consideration and well-reasoned conclusion obviates any need for further review by this Court.

CONCLUSION

For the reasons stated above, the Attorney General of New Jersey respectfully requests that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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